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No. 517

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In the Supreme Court of the United States

October Term, 1932.

PUBLIC SERVICE COMMISSION OF WISCONSIN, THEODORE KRONSHAGE, Jr., individually and as a Commissioner of said Public Service Commission of Wisconsin, A. R. McDONALD, individually and as a Commissioner of said Public Service Commission of Wisconsin, DAVID E. LILIENTHAL, individually and as a Commissioner of said Public Service Commission of Wisconsin, WILLIAM M. DINNEEN, individually and as Secretary of said Public Service Commission of Wisconsin, and JOHN W. REYNOLDS, individually and as the Attorney General of Wisconsin,

Appellants,

vs.

WISCONSIN TELEPHONE COMPANY, a Wisconsin corporation,

Appellee.

REPLY BRIEF OF APPELLEE IN SUPPORT OF ITS MOTION TO AFFIRM.

EDWIN S. MACK,
ARTHUR W. FAIRCHILD,
J. GILBERT HARDGROVE,
Counsel for Appellees.

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REPLY BRIEF OF APPELLEE IN SUPPORT OF ITS MOTION TO AFFIRM.

Appellee, Wisconsin Telephone Company, has filed its motion to affirm the decree below. Brief of appellants in

opposition to such motion was served upon the appellee on November 24, 1932, in which there appears, for the first time, a claim by the appellants that the interlocutory injunction is "in flat defiance of Equity Rule 70½" because of an alleged lack of findings of fact or conclusions of law.

The appellee submits this reply brief solely to answer this new claim.

Equity Rule 70½ is as follows:

> "In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rules 75 and 76."

I.

The Rule Is Not Applicable to Interlocutory Injunctions.

The Rule obviously has reference only to a final decree when the merits of the cause are finally determined on evidence. It is entirely unsuited to cases of interlocutory injunction where the purpose of the court is to preserve the *status quo* during the hearing of the cause, and particularly where, as in the case at bar, irreparable injury to the appellee is prevented during the interim which is necessary, for trial of the case and to determine what are the facts which are to be the subject of findings *(Ohio Oil Company vs. Conway,* 279 U. S. 813, 815).

It was evident to the court and indisputable on the face of the respective conflicting affidavits of the parties that there was a distinct issue as to the value of the appellee's

(plaintiff's) property and as to whether there was confiscation, although appellee maintains that confiscation appears on the face of the Commission's order itself. If appellee's (plaintiff's) assertion of facts as to value and the rate of return to be realized under the telephone rates prescribed in the Commission's Order should be sustained by the evidence, the conclusion of confiscation is inescapable, since the appellee's affidavits show that the return would be less than 2% (Unprinted Record pp. 136 to 138). Under these circumstances, what facts would the appellants have the court find? Do appellants seek to have the court make findings based upon conflicting affidavits, subject to revision and perhaps contradiction by the same court after the evidence is received? Findings under the circumstances here existing are obviously not contemplated by the Rule.

Every case cited by the appellants relates exclusively to the *final* decision of the court, excepting only the decisions by two statutory courts and one district court where the Rule was applied to an interlocutory injunction. In one of these, *Graniteville Manufacturing Company vs. Query*, 44 F. (2d) 64, findings were made pursuant to the Rule in denying the interlocutory injunction, as the appellants say "even though the parties had stipulated to the facts" (appellants' brief p. 6). If the facts were not in dispute, the denial of the interlocutory injunction was effectively a denial of a permament injunction and an examination of the opinion shows that the court really disposed of the case finally, even though in form the decision only denied an interlocutory injunction. Where the facts are undisputed, the application of Equity Rule 70½ is at least possible on an interlocutory injunction. In *Traitel Marble Co. vs. Manhattan Terrazzo Brass Stop Co.*, 56 F. (2d) 1039, the decree is in form interlocutory but was in fact after final hearing of the question disposed of. The other case cited, where

an interlocutory injunction was involved, is *Indianapolis Water Company vs. McCardle,* U. S. District Court, Southern District of Indiana, decided July 21, 1932. This case has not yet been included in any Reporter and the full text of the decision is not available. It is submtited that the mere fact that a court did make findings on an interlocutory injunction, under circumstances which are presently unknown, is not persuasive that the Rule applies to interlocutory injunctions generally under all circumstances and particularly under the circumstances which confronted the court in the case at bar.

An interlocutory injunction does not differ essentially from any other interlocutory order and, if the appellants are correct that Equity Rule 70½ requires findings of fact and conclusions of law for interlocutory injunctions, it would follow that the Rule would impose a similar requirement on every interlocutory order entered in the course of any case.

The Rule by its own terms is applicable "in deciding suits" and a mere interlocutory order, whether injunctional or otherwise, is not the decision contemplated by the Rule.

It is significant that in all of the appellants' argument on this point and under all of the authorities cited, constituting seven and one-half printed pages of their brief, there is no suggestion of authority for applying Rule 70½ to interlocutory injunctions, with the exception of the ~~two~~ three cases hereinbefore discussed.

The present Federal Equity Rules are derived from the New York Code of Procedure written by David Dudley Field (1 *Foster Federal Practice,* § 84, p. 579). One of the marked changes introduced by the said Code was to provide for the case being heard on the evidence in open court and disposed of on the evidence and for the inclusion of findings in the *decision.* The statutes or rules corresponding to

Rules 70½ and 71 of *The New Federal Equity Rules* are found in portions of the code relating to final disposition of the case. In Wisconsin, "a code state," the rule relative to findings appears as Section 270.33 of the Statutes under the chapter entitled "Issues, Trials and Judgments." It has been similarly placed since the code was adopted (*Wisconsin Revised Statutes of 1858*, Sec. 19, page 754). It is the Wisconsin practice not to make findings of fact or conclusions of law on interlocutory orders.

It is to be noted that the interlocutory decree appealed from here strictly follows the statutory requirements with respect to the requirement that "every order of injunction or restraining order shall set forth the reasons for the issuance of the same" (Title 28, U. S. C. § 383).

II.

The Court Has Set Forth a Finding of Fact and Conclusion of Law in its Decree.

The decree here, embodies a statement constituting "the reasons for the issuance" of the interlocutory injunction, as required by statute. This statement is "the court finding that an interlocutory injunction should issue because the rates for telephone service prescribed * * * would result in the confiscation of the property * * * and that the compulsion of the maintenance of said rates would deprive the complainant of property without compensation and without due process of law * * * and that irreparable injury to complainant will result unless an interlocutory injunction issue * * *." The foregoing constitutes a finding and it is so denominated in the decree. It is submitted that the foregoing language in the decree constitutes all of the findings of fact and conclusions of law that the court could make at this stage of the proceedings, under the circumstances.

III.

The Issues Present Several Other Grounds for an Injunction in Addition to That of Confiscation.

The complaint contained other allegations than confiscation, which required an injunction to be granted, and these are not referred to in the Order for the interlocutory injunction, because presumably the trial court did not deem it necessary to consider them at this time after finding that the allegation of confiscation was sustained by affidavits. These allegations included the denial, in a number of respects, of due process of law.

Respectfully submitted,

EDWIN S. MACK,
ARTHUR W. FAIRCHILD,
J. GILBERT HARDGROVE,
Counsel for Appellee.

November 26, 1932.